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ABSTRACT

An understanding of unfair labor practices and grievances in public education requires an examination of court decisions in areas of collective bargaining. In 1935 Congress enacted the National Labor Relations Act, granting only to private-sector employees the right to organize and bargain collectively. By the 1970's most states had rejected the idea of the sacrificial nature of public employment and had adopted statutory schemes relating to negotiations and labor relations between governmental employees and their employers. The trend of litigation is to increase the employer's burden of proof if coercion or restraint occurred in employees' exercise of protected rights. Recent court decisions reject employee discharge if antiunion animus was a factor. A teachers' union in Alaska, however, failed to produce sufficient evidence to meet the court's required burden of proof in "Alaska Community v. University of Alaska." The category of failure to abide by a collective bargaining agreement illustrates the merging of grievances and unfair labor practices. In this category, burden is placed upon employers to demonstrate why they have failed to abide by their own agreements. The area of refusal to bargain may require bargaining if the employer wishes to change the agreement. Other legal areas include unilateral changes in wages or employment conditions and nonmembership in employee organizations. As courts and boards test rights and responsibilities, labor relations should continue to improve. (CJH)

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Collective Bargaining: Management Prerogatives, Unfair Labor Practices and Grievances

Rodney Freeman, Jr.

While this article is limited to unfair labor practices and grievances, a complete understanding of the same cannot be gained without a discussion of collective bargaining in the public educational sector. Thus, an examination of the past, present, and future of these three topics will follow. But first, a brief look at the historical relationship between educators and their employers is perhaps in order.

In ancient Rome, Greek slaves were utilized as teachers. The apt Romans knew that the minds of Roman children, which represented the future of the empire, were being entrusted to the teachers; the power of absolute control, however, had to remain with Romans. While the concept of teachers as slaves gradually disappeared, students of colonial American history will recall that the early colonists provided education for their families by frequently employing indentured servants who sold their education and teaching skills for passage to America. This concept also gradually disappeared, but the extreme paternalism toward teachers remained. Everyone in education can remember from a mere generation or two ago, the requirements of remaining single, going to church, trimming the wick and tending the fire. This list could go on and on, but would be redundant since all know or knew of teachers who lived under this paternalistic system.

And while this paternalistic attitude was not limited to teachers and other public employees, teachers lagged far behind their counterparts in the private sector in acquiring the ability to control their destiny. In fact, nearly thirty years after private employees had been given the right of collective bargaining, the Supreme Court of Kansas said:

> The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining and contract.[1]

1. Wichita Pub. Schools Employees Union v. Smith, 397 P.2d 357 (Kan. 1964).

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The Past

In accordance with its constitutional power to regulate interstate commerce,[2] the United States Congress enacted, on July 5, 1935, the National Labor Relations Act.[3] This act and its primary amendments[4] were predicated upon certain findings and policy statements that are significant to an understanding of the current status of unfair labor practices and grievances.

Specifically, Congress found that when employees are denied the right to organize and collectively bargain with employers, strikes and other forms of industrial strife occur, which substantially impair and disrupt the commercial flow of goods in the United States. Congress further found that the inequality of bargaining power between unorganized employees and employers who were organized in corporate forms of association tended to aggravate business depressions by maintaining low wages and depressing the purchasing power of wage earners.

Congress then found that organized employees who are protected by law with collective bargaining safeguards promote the flow of commerce by encouraging friendly adjustment of industrial disputes concerning differences as to wages, hours, or other working conditions. Finally, in the 1947 amendment, Congress found that certain practices by labor organizations also burden and obstruct commerce through strikes and industrial unrest and that the elimination of these practices was necessary. Therefore, Congress declared, as a policy of the United States, that it was necessary to eliminate the causes of the above obstructions to the free flow of commerce and to encourage the practice and procedure of collective bargaining.[5]

Congress excluded, however, from the definition of "employer" and, thus, the NLRA itself, the United States, all wholly owned government corporations, the Federal Reserve Bank, and the states and their various political subdivisions.[6] Public employees, including public school district employees, as a consequence, were denied the rights and protection that Congress found necessary for their private counterparts.

In an attempt to explain the NLRA's exclusion of public or government employees, President Franklin D. Roosevelt, in a letter written to the National Federation of Federal Employees on August 1, 1937, set forth the fundamental characteristics which the President felt distinguished public employees from private employees. Roosevelt stated:

> [A]ll government employees should realize that the process of collective bargaining as usually understood, cannot be transplanted into the public service. It has its distinct and unsurmountable limitations when

2. Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938).
3. 29 U.S.C. §§ 151-169 [herinafter referred to as NLRA].
4. Taft-Hartley, 61 Stat. 136 (1947) and the Landum-Griffin Amendment, 73 Stat. 541 (1959).
5. 29 U.S.C. § 151.
6. 29 U.S.C. § 152(2).

> applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, by laws which establish policies, procedures, or rules in personnel matters.[7]

Even through the 1940s and 1950s, Roosevelt's position remained entrenched, not only in the United States Congress and state legislative bodies, but in the courts as well. In fact, in 1947 the Missouri Supreme Court reiterated President Roosevelt's position by holding that "A public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare."[8]

By the mid 1970s however, the sacrificial nature of public employment espoused by Roosevelt, the Missouri Supreme Court, and others was in large part rejected; thirty states had adopted statutory schemes relating to negotiations and labor relations between governmental employees and their employers.[9] These statutes were due, in many instances, to an unprecedented period of public employee labor strife in the 1960s.[10] Each of these statutory schemes appears cognizant of the findings and policy statements set forth by Congress in the NLRA, although they vary widely in the manner used to correct labor difficulties in the public sector.

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7. Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 215 N.W.2d 837 (S.D. 1974).

8. City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947).

9. Alaska Stat. §§ 14.20.550-.610 (1975) Cal. Educ. Code §§ 3540-3549.3 (West. Supp. 1976); Conn. Gen. Stat. Rev. §§ 10-153a-h (1975); Del. Code Ann. tit. 14, §§ 4001-4013 (1974); Fla. Stat. §§ 447.201-.607 (Supp. 1974); Hawaii Rev. Stat. §§ 89-1 to -21 (Supp. 1974); Idaho Code §§ 33-1271 to -1276 (Supp. 1975); Ind. Code §§ 20-7.5-1 to -14 (1975); Iowa Code Ann. §§ 20.1-.28 (Cum. Pamphlet 1975); Kan. Stat. Ann. §§ 72-5413-5425 (1972); Me. Rev. Stat. Ann. tit. 26, §§ 961-72 (Supp. 1974); Md. Ann. Code art. 77, § 160 (1975); Mass. Gen. Laws Ann. ch. 150E, §§ 1-15 (Supp. 1975); Mich. Stat. Ann. § 17.455 (1975); Minn. Stat. Ann. §§ 179.61-.76 (Supp. 1975); Mont. Rev. Codes Ann. §§ 59-1601-1617 (Supp. 1975); Neb. Rev. Stat. §§ 79-1287-1295 (1971); Nev. Rev. Stat. §§ 288.033-.270 (1975); ch. 490, [1975] N.H. Sess. Laws 603-11, *reported in* Gov't Empl. Rel. Rep. (BNA) RF-108, at 53-57 (August 25, 1975); N.J. Stat. Ann. §§ 34:13A-1-13 (Supp. 1975); N.Y. Educ. Law §§ 200-214 (McKinney Supp. 1975); N.D. Cent. Code §§ 15-38.1-15 (1971); Okla. Stat. Ann. tit. 70, §§ 509.1-.10 (1972); Or. Rev. Stat. §§ 243.650-.772 (1974); Pa. Stat. Ann. tit. 43, § 1101.101-.2301 (Supp. 1975); R.I. Gen. Laws Ann. §§ 28-9.3-16 (1969); S.D. Comp. Laws Ann. §§ 3-18-1-17 (1974); Vt. Stat. Ann. tit. 16, §§ 1981-2010 (Supp. 1975); 1975 Wash. Laws ch. 288, 1st Ex. Sess. 1227; 1975 Wash. Laws ch. 5, 2d Ex. Sess. 6, *reported in* Gov't. Emp. Rel. Rep. (BNA) RF-112, at 35-41 (July 10, 1975); Wis. Stat. Ann. §§ 111.70-.71 (1974).

10. South Dakota, e.g., experienced labor difficulties involving public employees in the mid 1960s, including strikes in 1968 by police officers and firefighters in Sioux Falls and public school teachers in Rapid City. Due to this strife in the public sector, the South Dakota legislature in 1969 adopted the Public Employees' Union Act, SDCL 3-18. Although frequently thought of as a conservative northern plains state, South Dakota's statutory scheme parallels the NLRA as closely as any state which has adopted public labor relations laws.

It appears, for most public employees, that the sacrificial days are over, as the cumulative thirty-year effects of the NLRA begin to merge with state statutes in providing rights and protection to public employees.

The Present

The NLRA, on behalf of private employees, protects the right to form and join labor organizations; to designate representatives for purposes of meeting and negotiating; and to engage in good faith bargaining. Employers may not interfere, restrain or coerce employees to join or refrain from joining labor organizations, nor may they dominate, interfere or assist in the formation of an employee organization. Finally, the NLRA prohibits an employer from discriminating in the hiring, tenure, employment, or discharge of employees based upon labor organization activity or the filing of a complaint or testimony. Similarly, an employee organization commits an unfair labor practice if it, or its agents, restrain or coerce an employer in the selection of its representative or causes the employer to discriminate against employees. The employee organization must also negotiate collectively in good faith.

As noted earlier, all state statutes dealing with public employee labor relations bear some resemblance to the NLRA. The rights and restrictions set forth above sharply parallel recent judicial activity in the area of unfair labor practices and grievances. Since 1981, most educational unfair labor practice complaints and grievances reaching appellate court level in the United States, with few exceptions, can be grouped into seven broad categories, which parallel the NLRA itself:

1. Restraint or coercion in the exercise of protected rights;
2. Discrimination;
3. Employment;
4. Failure to abide by collective bargaining agreement;
5. Refusal to bargain;
6. Unilateral changes in wages or conditions of employment;
7. Non-membership in employee organization; rival organization; and assistance to employee organizations.

While unfair labor practice complaints generally deal with the collective bargaining process itself, many of the complaints seemingly assume the guise of grievances by dealing with the implementation or interpretation of the bargained agreement. Thus, with the exception of those grievances dealing with an employee representative's failure to properly represent an employee, both unfair labor practice complaints and grievances can be categorized as set forth above.

What guidance, then, do these seven categories, and the recent cases contained in each, provide to those who must grapple with the issues?

Restraint or Coercion

While the NLRA and most state statutes provide that public employees have a right to form, join, and participate in labor organizations free from restraint or coercion by employers, the court in New York has taken this statutory protection one step further by providing the protection prior to the time that public employees are actually organized into a unit. In fact, employees are protected who are not seeking to form an employee organization at the time.

In *Rosen v. Public Employment Relations Board*,[11] the petitioner, Francine Rosen, was a public teacher at a New York state community college. In September 1980, Rosen was chosen by several of her fellow teachers to voice concerns about various aspects of their employment to the associate dean. Throughout the intervening years, including 1982, Rosen continued her attempts to resolve the teachers' concern with the terms and conditions of employment; however, in January 1983, Rosen's working hours, and thus her salary, were reduced because of her efforts. She challenged this action before the state Public Employee's Relations Board charging that the college unlawfully interfered with her right to form an employee organization and attempted to coerce and restrain other employees from exercising their protected rights. The board found that Rosen's conduct was not protected since there was no indication in the record that the teachers were seeking to form an employee organization or to be represented by such an organization.

The Supreme Court thought differently, holding that if employees were to have a right to form a union but could be fired or coerced by their employer for complaints that are voiced prior to organization, then the right to organize is illusory. Further, the court felt that if persons who were not yet organized saw the effect their complaints had upon the group's leader, this would have a chilling effect upon the exercise of a protected activity. Thus, the court extended the protection against restraint or coercion from that of existing labor organizations to individuals acting prior to organization itself.

In yet another decision, *Profitt v. Wayne-Westland Community Schools*,[12] the Michigan court, interpreting its state Public Employment Relations Act, determined that a teacher union representative's breach of duty to fairly represent the teacher plaintiff's grievance and enforce contractual provisions was an unfair labor practice in that it resulted in an employee's unwillingness to participate in the union, thereby restraining or coercing employees in their right to engage in protected concerted activity.

Finally, in *Association of Independent Professionals v. Maine L.R.B.*,[13] the Supreme Judicial Court of Maine struggled in attempting to balance the first amendment rights of an employer against the em-

11. 490 N.Y.S.2d 705 (Sup. Ct. 1985).
12. 364 N.W.2d 359 (Mich. Ct. App. 1985).
13. 465 A.2d 401 (Me. 1983).

ployees' right to be free from restraint or coercion in organizational matters. In that case, a certified bargaining unit for the University of Maine faculty, an affiliate of the National Education Association, entered into a collective bargaining agreement with the university that provided check-off and maintenance of membership fee options. Some faculty members failed to select any of the options and the bargaining unit threatened legal action to require selection of one of the options.

Several of the faculty members against whom legal action was threatened formed the Association of Independent Professionals with a goal of acting as a focal point for information on available alternatives to the fee option check-off. The association published certain flyers which the Maine Labor Relations Board found contained false and misleading information that interfered with the collective bargaining agreement and the certified bargaining unit. However, on appeal to the court, while agreeing with the board's conclusion that distribution of the flyer constituted an unfair labor practice, the court vacated the board's cease and desist order since it impermissibly restricted the association's freedom of expression. The court went on to note that there was insufficient evidence presented to show that the labor stability or school environment of the university system was threatened or that specific interference with university operations had resulted.

As can be seen, the burden of proof in this category increases as the restraint nears or crosses the path of other protected interests. This pattern also emerges in the following category.

Discharge

Several recent decisions in this area have all supported the premise that it is an unfair labor practice to discharge an employee if anti-union animus was a substantial or motivating factor in that discharge. Each case tends to localize this broad generalization, however, and must be revised for each jurisdiction. In *Maram v. Universidad InterAmericana de Puerto Rico*,[14] the court felt there was substantial evidence, both circumstantial and direct, indicating that the discharge was motivated by union activity. To quote the court:

> We recognize that, on the clear record, there could well have been a sound and supportable business basis for contracting out the janitorial services quite apart from the union, and that University's antedating the exhibit was merely an unwise attempt to paint the lilly. However, a use of a faulty firearm must risk a backfire.

Thus, the discharge of the entire university janitorial workforce in the face of unionization was clearly an unfair labor practice of much greater magnitude than a case where only a handful of selected organizers are involved. Again, the court said: "The union, without early relief, may well be done for."

14. 722 F.2d 953 (1st Cir. 1983).

In *Southern Worcester County v. Labor Relations Commission*,[15] the Massachusets Supreme Court also adopted this "but for" test, holding that it strikes an equitable balance among the interests at stake. The employer is not forced to accept an unsatisfactory employee, and unionized employees are subject to discipline the same as all others. Regarding the burden of proof, the court indicated that the employee bears the ultimate burden of persuasion but may rely on a prima facie showing to shift to the employer a limited burden of producing evidence. In order to establish a prima facie case, an employee need not introduce direct evidence of unlawful motive such as anti-union statements, but instead, may rely upon factual matter which may revolve upon circumstantial evidence from all of the facts. If, however, the employer has stated a lawful reason for its decision and produces supporting facts, the prima facie case is rebutted. Therefore, the burden of persuasion remains on the employee, who must prove by a preponderance of evidence that the asserted lawful reason for discharge was not the real reason.

The Vermont Supreme Court, in *Kelly v. Day Care Center, Inc.*,[16] made it clear that discharge of a public employee motivated solely by inadequacies of performance did not constitute an unfair labor practice. If this is the case, the employer's motive for discharge becomes a crucial issue when the firing is challenged by the employee. Because of the difficulty in proving illegal considerations, the court approved the practice of inferring unlawful motivation from attending circumstances. Among the circumstances which permit such an inference are the employer's knowledge of the employee's labor activity, evidence that it fostered a climate of coercion, and the suspicious timing of the discharge.

The issue of discharge has also been questioned in the light of agency shop clauses.[17] In *Board of Education of School District v. Parks*,[18] the Michigan Supreme Court considered the impact of an agency shop agreement upon a tenured teacher. In the agreement negotiated between the board of education and the teachers' union, teachers were required to pay a union service fee. If a teacher failed to pay this fee, the board of education was required to discharge the employee. The teacher plaintiff initially paid the fees under protest but, after a period of time, she refused further payment. At the request of the teachers' union, she was discharged by the board.

The court held that a union that improperly demands that an employee be discharged for failure to pay union service fees commits an unfair labor practice and that an employer that improperly discharges said employee likewise commits an unfair labor practice. However, in the instant case, the court held that the state's tenure act was inapplica-

15. 436 N.E.2d 380 (Mass. 1982).

16. 451 A.2d 1106 (Vt. 1982).

17. This clause generally provides that all employees represented by a union, whether union members or not, must pay a service fee to the union for services provided.

18. 335 N.W.2d 641 (Mich. 1983).

ble in that the Public Employment Relations Act permitted an employer to agree with a union to require, as a condition of employment, that all employees pay union service fees. Thus, no unfair labor practice was committed by either party since the discharge was pursuant to a properly negotiated agreement.

The key elements present in this series of cases appear to be the presence of anti-union animus and the burden of proof. These elements again flow to the next area under consideration.

Employment

Alaska Community v. University of Alaska[19] clearly demonstrates the flow of elements addressed above. The Supreme Court of Alaska held that, with the rarest of exceptions, the discharge or lesser discipline of an employee for union activity will not be deemed an unfair labor practice absence proof of an anti-union animus. In this case, the court held that the teachers' union was required to demonstrate that a union negotiator was denied summer employment because of some anti-union motivation on the part of the university and, in the absence of such, no unfair labor practice was found. It was determined by the court that the failure to hire the negotiator was based upon the fact that more qualified applicants were available and ultimately, that a lack of student interest caused the class to be cancelled. The union thus failed to demonstrate the necessary anti-union animus as the basis for an unfair labor practice. The emerging pattern in the categories addressed suggests that it is relatively easy to allege unfair labor practices and/or grievances, but producing evidence sufficient to meet the courts' required burden of proof is much more difficult.

Failure to Abide by Collective Bargaining Agreement

With the exception of the category encompassing unilateral changes in wages or conditions of employment, no other category better illustrates the merging nature of grievances and unfair labor practices. In *Savage Public Schools v. Savage Education Association*,[20] the local board of education had refused to submit a grievance over non-renewal procedures to arbitration as was required by the collective bargaining agreement entered into between the school board and the teachers' association. The teachers' association appealed the matter to the Board of Personnel Appeals which held that, under the collective bargaining agreement, the school board's refusal to permit arbitration was not only a refusal to bargain in good faith but an unfair labor practice as well. This was based upon the fact that a breach of the agreement constituted an unfair labor practice.

19. 669 P.2d 1299 (Alaska 1983).
20. 647 P.2d 833 (Mont. 1982).

On appeal, however, the state district court reversed the Board of Personnel Appeals and held that the school district had the sole discretion to remove non-tenured teachers and, therefore, the grievance relative to their non-renewal could not be submitted to arbitration. The hiring and retention of employees was held to be a managerial prerogative that was an improper subject of the bargaining agreement. But the Supreme Court of Montana reversed the district court. Since the collective bargaining agreement only referred to a grievance relating to the procedural steps employed in non-renewal and not the substantive grounds, the court felt that the statutorily reserved management rights of the school district were not affected.

Another issue frequently raised in this area is the failure to follow an arbiter's award. In *Board of Trustees v. Keene State College*,[21] the Supreme Court of New Hampshire held that a breach of a collective bargaining agreement is an unfair labor practice and that, when arbitration is entered into by the parties to a labor dispute pursuant to that agreement, the failure by one of the parties to abide by the resulting arbitration award is a breach of the agreement and, thus, an unfair labor practice.

It is abundantly clear that duly authorized collective bargaining agreements will be enforced by the courts. As opposed to previous categories, the burden here appears squarely placed upon employers to demonstrate why they have failed to abide by their own agreements. This burden continues through the next area.

Refusal to Bargain

While many of the cases in this category deal with the issue of bargaining in good faith, there are several other issues unrelated to good faith that should be addressed, since they provide insight into the direction the courts are taking.

In re White Mountain Regional School Board,[22] disclosed several of these issues. In that case, the school district entered into a collective bargaining agreement with White Mountain's Education Association which was the exclusive bargaining agent not only for teachers but for cooks and related workers as well. The agreement provided that the employees covered were to be employed for up to eight hours a day.

Pursuant to this, the district entered into individual employment contracts with the cooks setting forth the exact number of hours to be worked by each. Later, due to partial loss of funding, the district recognized that it would have to reduce the number of hours for cooks. After meeting with the individuals, the district notified four of them that their hours would be reduced from the levels set forth in their individual contracts. This caused the teachers' association to file an unfair labor practice complaint with the state Public Employee Labor

21. 493 A.2d 1121 (N.H. 1985).
22. 485 A.2d 1042 (N.H. 1984).

Relations Board alleging, among other things, several unfair labor practices for refusal to negotiate.

On appeal, the board of education asserted four defenses against the labor relations board's findings of unfair labor practices, which included the assertion that the district retained the right to relieve employees of duties because of lack of work or a reduction in funding. To this, the Supreme Court of New Hampshire replied that the district did not have to bind itself unconditionally to employ the cooks for a certain number of hours but, when it chose to do so in individual contracts, it was bound and lack of funding or work would not relieve it from that obligation. To change the contracts without bargaining was tantamount to a refusal to negotiate or bargain collectively, which was an unfair labor practice.

In a somewhat similar case, *Minersville Area School v. Commonwealth of Pennsylvania Labor Relations*,[23] the Commonwealth Court of Pennsylvania held that a school district failed to bargain in good faith over the issue of whether the district's cafeteria services should be performed by an independent contractor. When the district entered into negotiations with the employees for a new agreement to replace the one about to expire, it could not contract out cafeteria services after having met only one time with the workers. The court held that certain steps must be followed if the district was to satisfy its obligation to bargain with the employees. Did the district seek concessions from its cafeteria employees? Did the district then seek bids from private contractors if the employees refused to make concessions? Did it then go back to the employees after having received bids and continue negotiations on concessions from the employees? In this case, the court concluded that the district had not bargained on the issue of utilization of a private contractor and, thus, an unfair labor practice had been committed.

The distinction between refusal to bargain on items affecting only teachers and those affecting the school community as a whole is illustrated in *Union County School Corporation v. Indiana Education*.[24] Here, the court concluded, in upholding the state labor relations board's finding, that scheduling of makeup days was an item of mandatory discussion which could not be unilaterally adopted. Thus, the refusal to discuss this was an unfair labor practice based upon a refusal to bargain. The court rejected a similar finding relative to the school closing plan. The court felt that a school closing plan directly affects everyone in the school community by determining attendance and that, often, exigent circumstances require the immediate need to adopt a plan in order to be prepared. Based upon this, the school board should not be required to delay implementation of such a plan simply to discuss it with one particular interest group, the teachers' association.

Finally, no unfair labor practice based upon a refusal to bargain was found by the court in *Alaska Community v. University of Alaska*[25]

23. 475 A.2d 962 (Pa. Commw. Ct. 1984).
24. 471 N.E.2d 1191 (Ind. App. Ct. 1984).
25. 669 P.2d 1299 (Alsaka 1983).

when the employer refused to sign a tentative agreement. One of the ground rules agreed to between the union and the university's representative was that "any proposal, once signed by all parties, shall cease to be an object of further negotiation, and is subject only to ratification of the entire agreement by the union membership and the board of regents." Thereafter, a tentative agreement between the negotiators was reached and initialed but the university's board of regents refused to ratify the agreement until the new incoming university president had an opportunity to review it and make recommendations. Upon his review, he recommended that it not be ratified and it was rejected by the board.

The union alleged that this was an unfair labor practice. The court held that it was permissible for the board to refuse to ratify the tentative agreement so long as this refusal did not result from the board's intent to string out negotiations or avoid reaching agreement. Here, the board simply was exercising its option to disapprove a tentative agreement in accordance with the agreed upon ground rule.

As seen in earlier categories, courts require strict compliance with the bargaining agreement. Here, they also require that bargaining itself take place if the employer wishes to change the agreement. This requirement has also been extended to prohibit unilateral changes by the employer.

Unilateral Changes in Wages or Conditions of Employment

In this category, two distinct doctrines emerge: the alter ego theory and maintenance of the status quo. In defining status quo, the court in *Indiana Education Employment v. Millcreek Teachers*,[26] held that the legal definition as related to labor relations was "the existing state of things at any given date ... the last actual, peaceful, uncontested status which preceded the pending controversy."

In this particular case, the existing agreement between the teachers and the board of education expired during negotiations and the board continued to pay the teachers based upon their previous years' salary without the increases, or increments, based upon longevity and experience, that had been built into the previous years' negotiated agreement. The court held that the refusal to grant the increment pending agreement on the new contract was a unilateral change in existing conditions of employment that resulted in an unfair labor practice.

Further, in order to maintain the status quo of the prior contract, the board was required to maintain the salary schedule, including increments which were a part of that schedule. The board's refusal amounted to a penalty on the employees and their bargaining agent for exercising their rights under the previous agreement. This court felt that mainte-

26. 456 N.E.2d 709 (Ind. 1983).

nance of the status quo after expiration of the previous contract and during negotiations for a new contract is important since it serves to continue the balance in the bargaining power of the parties and provides the necessary flexibility to reach agreement.

A contrary holding was expressed however, in *Fairview School District v. Unemployment Compensation Board of Review.*[27] Under similar circumstances as in *Millcreek Teachers*, the Pennsylvania Supreme Court held that the school district's refusal to step up salaries did not constitute a disruption of the status quo. Indeed, to require the salary increments contained in the expired contract would change the existing relationship; the underlying rationale for the status quo requirement is to allow the parties to continue working and negotiating on an equal basis in good faith. Alteration of any condition of employment could be used by one party as leverage in the ongoing negotiation process to the disadvantage of the other party.

Insurance benefits have also been addressed by several courts in a similar manner. When a prior negotiated agreement expires during negotiations for a new agreement, insurance benefits cannot unilaterally be discontinued by an employer.[28] Further, while an expired agreement may provide that a school district has the authority to change insurance carriers so long as the benefits provided are at least equal to the old carriers, it has been held that this ability ceases when the prior agreement expires and that the carrier must remain the same in order to continue the status quo. Even the smallest changes have been considered a disruption of the status quo.[29]

Once negotiations for the new collective bargaining agreement have reached impasse, however, the employer may make unilateral changes to implement the last offer that the teachers have rejected. In fact, the employer need not implement changes exactly identical with its last offer so long as the unilateral adoptions are reasonably comprehended within the preimpasse proposals.[30]

The Michigan Court of Appeals, in *West Ottawa Education Association v. West Ottawa Public Schools*,[31] dealt with the alter ego test advanced by the education association. In 1980, the board of education determined to discontinue a class in Dutch dance. The instructor of the dance program was a part of the teacher association's bargaining unit. The dance class, however, was offered the next year by the community education program and was taught by the same instructor at the same salary. The program was run by a consortium composed of three school districts, one of which was West Ottawa. The teachers' association

27. 454 A.2d 517 (Pa. 1982).

28. Smith County Educ. Ass'n v. Anderson, 676 S.W. 2d 328 (Tenn. 1984).

29. Grandinetti v. Commonwealth Unemployment Compensation Bd., 486 A.2d 1040 (Pa. Commw. 1985); Chichester School Dist. v. Unemployment Compensation Bd. of Rev., 415 A.2d 997 (Pa. Commw. 1980).

30. Public Employment v. Modesto City Schools, 186 Cal. Rptr. 634, 136 Cal. App. 3d 902 (1982).

31. 337 N.W.2d 533 (Mich. Ct. App. 1983).

alleged that the board had sub-contracted the teaching of Dutch dance without first bargaining with the association and that this *amounted to an unfair labor* practice. They further claimed that the consortium was the alter ego of West Ottawa. In determining whether the consortium was an alter ego, the court considered such factors as whether the two enterprises had substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. The focus of this test was on any continuing disguised attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. The court also noted that this test was closely related to the "single employer" doctrine employed by the National Labor Relations Board. In the instant case, the court held that the two entities were not alter egos of one another.

While the courts appear divided on the question of maintenance of the status quo, a clear test for determining an alter ego organization has been developed. Tests such as that, however, are more the exception than the rule.

Non-Membership, Rival Union, and Assistance

As was noted in a previous category, it is an unfair labor practice for a union to improperly demand that an employee be discharged for failure to pay agency service fees; also, it is unfair for an employer to discharge the employee for such failure. But in those states that permit agency service fees, such a demand or discharge is not an unfair labor practice.[32] Further, grievances and unfair labor practices are frequently alleged in the area of a teacher association's failure to adequately represent the interests of a non-member. While a wide range of reasonableness is allowed bargaining representatives in serving the units they represent, they are always held to complete good faith and honesty of purpose in the exercise of this discretion.[33]

The courts have also addressed activity by boards and teacher associations against rival unions. In *School Board of Dade County v. Dade Teacher's Association*,[34] the court held that the school board and the teacher's union committed an unfair labor practice against a rival union by removing the rival's materials from all-purpose school bulletin boards and by prohibiting members of the rival from soliciting memberships in the school parking lots. The board based its parking lot policy upon extraordinary circumstances related to increased criminal activity on school campuses, perpetrated by outsiders entering the school property. The court held that the need for security did not justify the no access rule if another rule which was less restrictive of the rival employees' rights would have accomplished the same goal.

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32. Board of Educ. of School Dist. v. Parks, 335 N.W.2d 641 (Mich. 1983).
33. Trinque v. Mount Wachusett Community College Faculty Ass'n, 437 N.E.2d 564 (Mass. Ct. App. 1982).
34. 421 So. 2d 645 (Fla. Dist. Ct. App. 1982).

The board's defense of the denial of bulletin board privileges was based upon the belief that this would endanger harmony and cause friction among employees. The court felt that both state law and the first amendment prohibited such a rationale. Thus, both policies were held to be unfair labor practices.

The assistance to a union is an area that somewhat parallels that of rival unions. The Washington Supreme Court had the opportunity to address this category by deciding whether or not contributions or gifts to a union constituted an unfair labor practice. In that case, the school district had agreed in a collective bargaining contract that certain employees were allowed release time to be used at the behest of the education association.[35] The state auditor alleged that this contributed support to the employee organization and thus violated the state's labor law relating to unfair labor practices. However, the court felt that, in this context, contributed support to an employee organization was analogous to the granting of something without an obligation to do so.

Throughout all of the categories discussed, we see the dominance of NLRA philosophy and policy in public sector labor relations. While many state laws are not closely modeled upon the NLRA, the cases discussed in this article relied upon the federal act for guidance and interpretation of the issues presented. It is true that some jurisdictional differences exist, but generally speaking, the courts are uniform in interpretations that are consistent with the NLRA.

The Future

As might be expected, when the majority of the nation's public educational employees were granted various forms of unionization and collective bargaining rights in the 1960s and '70s, a period of turmoil resulted. This has frequently been the case when once excluded members of a group are suddenly brought into the fold. The expansion of civil rights to various minorities is an example of the creation of massive judicial activity where little or none once existed.

After more than ten years of judicial intervention and activity in public education labor relations, the dust appears to be settling as both employers and employees become more aware not only of their rights, but of their responsibilities as well. More importantly, it appears from the recent case activity in the area of unfair labor practices and grievances that the adversarial nature of these labor relations may be diminishing as the parties seek judicial guidance on genuine issues of concern.

As the courts and various state labor relations boards continue to define rights and responsibilities and to develop workable tests to implement the same, labor relations should continue to improve. Adolescence is exciting and new to the youngster who is growing and experiencing the zest of life; however, as the youngster matures into the

35. State *ex rel.* Graham v. Northshore School Dist., 662 P.2d 38 (Wash. 1983).

adult, the knowledge of the responsibilities and limits placed upon the adult by society restricts conduct to limits that are acceptable. It appears from the cases concerning unfair labor practices and grievances that labor relations in public education has grown from adolescence and is emerging into a mature adult.